United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF AND APPENDIX

Docket No. 75-7243

IN THE

United States Court of Appeals

For the Second Circuit

CLIFFORD J. ARNOLD,

Plaintiff-Appellee,

—against—

DONALD M. AGEN and VICTOR CERAMI,

Defendants-Appellants.

ON APPEAL FROM A JUDGMENT IN THE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

APPELLEE'S BRIEF AND APPENDIX

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PRELIMINARY STATEMENT

This is an Appeal by the Defendants from a Judgment of the United States District Court, Western District of New York (Elfvin, J.), entered March 4, 1975, after a jury trial, which awarded Plaintiff general damages in the sum of FIVE THOUSAND AND THIRTY FOUR DOLLARS AND THIRTY EIGHT CENTS($5,034.38), and punitive damages of FIFTEEN THOUSAND DOLLARS ($15,000.00) assessed Twelve Thousand Dollars ($12,000.00) against the Defendant CERAMI and Three Thousand Dollars ($3,000.00) against the Defendant AGEN.

On June 3, 1975, the Defendants made a Motion before Judge Elfvin to stay the execution of the Judgment pending the Appeal. This Motion was granted on the stipulation of an Assistant Attorney General of the State of New York that the State of New York would stand as surety for the Judgment as to both general and punitive damages.

STATEMENT OF THE CASE

This is a Civil Rights Action, brought under the provisions of Title 42, U.S.C., Section 1983. The Defendants were Security Officers in the employ of the

State University of New York, and were acting under color of State law when, on the 13th day of October, 1973, the Defendants caused certain injuries to the Plaintiff.

The State University of New York, College at Buffalo, employs the Defendants as Security Officers to protect the campus property, located in the City of Buffalo, New York.

This campus is abutted on two sides by City Streets, on another side by a State highway and on the other side by a State institution known as the Buffalo Psychiatric Hospital.

On October 13, 1973, an automobile, driven by one Richard Tarquinio, was proceeding north on Reese Street, the City street abutting the westerly side of the campus when said automobile failed to stop for a stop sign, and proceeded to turn left into Letchworth Street, another City street, and proceeded approximately another block beyond the traffic intersection of Grant Street, another City street. The Defendant Agen was the operator of a campus security car, which had been approaching the intersection of Reese and Letchworth, on Rockwell Road, a campus street. The vehicle proceeded off the campus, in pursuit of the offending vehicle.

After some conversation with the operator thereof, Defendant Agen procured the Registration, apparently from the Plaintiff, and a shouting match ensued over the continued possession of the Registration by Agen. Although Agen conceded that he could have issued the summons at any time, right on the spot, (R-321) and further, that Reese and Letchworth were City streets in his mind on October 13, 1973 (R-326) and further, that he was satisfied that the Registration was in proper form (R-327), Defendant Agen persisted that Arnold would have to come to the campus to procure the Registration after Agen was finished with it. This put Arnold in the untenable position of being required to operate his motor vehicle without the Registration. Agen further had remembered the number of the license of the vehicle, and made the connection with Mr. Arnold with conversations with him, as to a prior incident one week earlier, in which Mr. Arnold allegedly had had an altercation with other campus Officers (R-330, R-332).

Mr. Arnold then reached or grabbed for the Registration, Defendant Agen on cross-examination agreeing that he did come in the direction of the Registration (R-329) and Agen then grabbed Arnold and attempted to hold him. Arnold was then struck several times, once

at least, by the Defendant Cerami with a black-jack. Cerami had observed the scene for approximately five to ten seconds before he went into action (R-370). Although no one asked for his help, and his shift supervisor, Lieutenant Magnani was on the scene, Cerami got in to the thick of it, attempted to reach for his long billy-club, which he testified he had gotten into trouble about previously (R-380), could not reach it, and used the black-jack, although he testified that it would tend to make him look better if he had succeeded in reaching the billy-club (R-389).

Plaintiff was then taken into custody, removed to the Campus Security Office, thence to a hospital, and then turned over to the Buffalo Police for processing. He appeared in Buffalo City Court later that morning and was released in his own recognizance. Thereafter, the charges were dismissed and on a subsequent occasion, the charges having been re-laid by Defendant Agen, the charges were again dismissed. Plaintiff was caused to lose time from work, expend attorney's fees in the defense of the criminal charges and seek medical aid and attention for the blows to his head, which resulted in numerous stitches.

MEMORANDUM OF LAW

POINT I DEFENDANTS HAD NO AUTHORITY, EITHER AS PEACE OR POLICE OFFICERS, ONCE THEY LEFT THE CONFINES OF THE CAMPUS.

The source of these Defendant- Campus Security Officers' status commenced with the enactment of Chapter 525 of the New York Laws of 1953, effective September 1, 1953, when Section 355(2)(m) of the Education Law of the State of New York was enacted. It provided, in pertinent part as follows:

> "It shall be the duty of such special policemen to preserve law and order in and about the buildings and grounds of the institution of the State University to which they are assigned, and their jurisdiction shall extend to the buildings and grounds of such institution and to the extent of one mile beyond such grounds."

Had the Legislature remained silent, on October 13, 1973, the date of this incident, the Officers would have been within the scope of their employment off the campus, concededly within the one-mile range. However, Chapter 383 of the Laws of 1972, effective May 22, 1972, amended Section 355(2)(m) of the Education Law, providing for the appointment of Security Officers and Peace Officers, as two distinct categories of personnel to serve the State University. The Law provided that any person appointed a "Peace Officer" must complete certain training requirements. The Law further provided as follows:

> "It shall be duty of such Security Officers and Peace Officers to preserve law and order in and about the buildings and grounds of the institution of the State University to which they are assigned."

The jurisdiction which was previously extended to the extent of one mile beyond such grounds, was removed by the Legislature. The provision continued:

> "Persons appointed Peace Officers shall, in the course of and actual performance of their official duties, have the powers of police officers as defined in the Criminal Procedure Law."

The Legislature had specifically excluded Campus Security Officers under the definition of Peace Officers in the Criminal Procedure Law. This new state of affairs caused the University Counsel to write a letter to the New York Attorney General, which was acted upon in a published Opinion by the Attorney General, 1971 Report of Attorney General, October, 1971, at pp. 37 and 38, reproduced here as Appendix 1 and 2.

The Opinion is clear that, even though Campus Officers have police officer powers when in the performance of their duties, their geographical jurisdiction is determined by the Education Law.

Another State statute, bearing on this critical

question of the authority of Campus Officers off the campus provides that such officers have the power to issue traffic citations:

> ". . . for traffic violations committed on the property, streets, roads and highways owned, controlled and maintained by State University and within the grounds of any institution therein constituting a part of the administrative, educational or research plant or plants owned or under the supervision, administration and control of said university . . . ."
> New York Education Law, Section 362(4)

There is no doubt under the facts of this case that Reese Street was a City street, off the campus, that Grant and Letchworth Streets where the Officer attempted to investigate, with a view to give a summons was not on the campus, nor could he compel the Plaintiff to return with him to the Campus for the purpose of securing the Registration.

Prior to the incident here in question, the State University apparently made a determination that it wanted to give their Officers the authority which the Attorney General claims they already have. Annexed hereto as Appendix-3, is an excerpt of the Board Minutes of the University Trustees, and the Memorandum submitted to them on January 24, 1973, advising the Trustees of the

pre-filing of a Bill in the New York Senate, which would grant Campus Security Officers full police powers. The Bills, which never saw any action in either the Senate or Assembly, are annexed as Appendix-6 and Appendix-7. This year's session of the Legislature saw another Bill, which has failed to become Law, granting these Campus Security Officers police powers. This Legislative history clearly indicates that the State University does not feel that its Officers have full authority, as urged by the Attorney General, nor does the Attorney General, in his own published Opinions, feel that such officers have such authority.

The case of Peo. v. Wesley, 80 Misc.2d 1002 (City Ct. of Buffalo, 1975), cited by the Appellants, concerned an arrest in a dormitory located on the campus, for the crime of criminal trespass. Undoubtedly, Campus Security Officers have the power to make arrests on campus; however, the Court pointed out quite correctly that their authority as Peace Officers is limited to the extent set forth in the Education Law.

Defendants' Brief calls attention to their Appendix Exhibits A & B, found at page 37 through 39 of the Appendix. These documents were not introduced below and should not be in the Appendix. In any event,

they are irrelevant to the question of whether the Law gives the Security Officers Peace Officer status off the campus. It is clear that it does not.

Defendants' Brief then seeks to explain the term "preserve law and order in and about the campus." It is submitted that this phrase is meaningless, since the statute under which the Officers receive their authority, refers to the following criteria:

> "It shall be the duty of such Security Officers and Peace Officers to preserve law and order in and about the buildings and grounds of the institution of the State University to which they are assigned."
> N.Y. Educ.Law, Section 355(2)(m)

The case of Ryan v. Desmond, 118 Ill.App. 186 (1905) does not further explain the term "in and about" since, in that case, the term "about" is used in the context of time rather than distance, as is the case at Bar.

Defendants then cite various ancient Alabama cases, ranging from the 1850's through the 1880's, in support of their position. These cases deal with a peculiar statute, concerning the selling of liquor on or about certain premises. It deals with the culpability of the seller of such intoxicants, and is limited to that

factual situation.

Defendants then cite the case of Thompson v. Brooks, 43 N.H. 540 (1862). This case is more supportive of Plaintiff's position than Defendants'.

> "We do not think that the expression 'on or about' &c., was intended to mean that the grantee might lay logs and lumber, not only on his own land, but outside of it, on the defendant's land adjoining."

The Court continues:

> "Though the word 'about' may frequently have the meaning of around, on the outside of, without the limits of, &c., yet it frequently, in common conversation, means through, or over, in various directions, or, in the various parts of the whole promiscuously. To travel about the country means to go from place to place in the country, and not out of it. A man about town, is not a man out of town."
> Thompson v. Brooks, supra, 43 N.H. at 541.

Especially in the context of the Legislative history which has been presented in this Brief, and in light of the context of the Statute speaking of "in and about the buildings and grounds", leads to the inescapable conclusion that Campus Security Officers have police powers only on the campus. The testimony and the charge in this case clearly indicates that the stop sign in question was for traffic proceeding north on Reese Street, a City street. There is no campus involvement whatsoever.

Two New York ancient cases, which the Defendants have failed to mention, concern themselves with the term "in and about."

> "Beyond doubt, it means so far outside as the street surface was disturbed in the act of laying the track."
> McMahon v. Second Ave. R. Co., 75 N.Y. 231, 236 (1878); see also, City of New York v. Second Ave.R. Co. 31 Hun. 241, 245 (1st Dep't.1883).

Adopting the reasoning of these cases to the case at Bar would allow the Campus Security Officers authority only to the property line of the campus, as has been urged by the Plaintiff.

Defendants' Brief, at page 18, urges that the Vehicle and Traffic Law, Section 132, is the authority for the Defendants' traffic ticketing powers. Obviously, Section 362(4) of the Education Law (as previously cited) is the appropriate statute.

POINT II OFFICERS AGEN AND CERAMI WERE IN VIOLATION OF STATE LAW WHEN THEY POSSESSED AND USED A BILLY-CLUB AND BLACK-JACK.

At the time of the incident, New York Penal Law, Section 265.05, entitled "Possession of Weapons and Dangerous Instruments and Appliances," provided in Part:

"Any person who has in his possession any firearm, gravity knife, switch-blade knife, billy, black-jack, bludgeon, metal knuckles, sand-bag, sand-club or slung shot, is guilty of a Class A misdemanor . . . "

* * *

"9. Any person who has in his possession any dagger, dangerous knife, dirk, razor, stiletto, imitation pistol, or any other dangerous or deadly instrument or weapon with intent to use the same unlawfully against another, is guilty of a a Class A misdeamanor . . ."

Section 265.20 of the New York Penal Law provided for exemptions from prosecution, under these Sections, for:

"[p]ersons in the military service of the state of New York, when duly authorized by regulations by the Chief of Staff to the Governor to possess the same, members of the Division of State Police and Peace Officers as defined in Section 1.20 (33) of the Criminal Procedure Law."

State University Security Officers were not defined as "Peace Officers" in the Criminal Procedure Law. Their authority comes solely from Section 355(2)(m) of the Education Law. It is clear that there was no Legislative oversight in not defining Campus Security Officers as Peace Officers, with full powers under the Criminal Procedure Law, as can be seen from the panoply

of persons who have been granted that status, such as Harbor Master, Onondaga County Park Rangers, Bay Constables of the Town of Oyster Bay, and other minor state functionaries. The Attorney General of the State of New York has determined, in construing the exemptions Section above, that Peace Officers appointed as auxiliary police are not exempt from the provisions regarding the unlawful possession of weapons contained in the Penal Law. See, 1972 Attorney General's Informal Opinions of July 14, 1972, and December 11, 1972, set forth in the Appendix as Appendix 11 through Appendix 15.

It is also noted that the New York State Legislature, in 1974, amended the Education Law provision here in issue, to exempt Campus Security Officers from prosecution under the Penal Law for possession of a police night-stick or baton. See, New York Laws of 1974, Chapter 174, effective April 16, 1974.

By inference, other dangerous instruments, black-jacks, pistols or bludgeons, are carried at a Security Officer's peril, subjecting him to prosecution under the Penal Law. The Legislative history alluded to in Point I, further attests to the fact that Campus Security Officers, not having been specifically enumerated under Section 1.20(33) of the Criminal Procedure Law,

as Peace Officers, they are not entitled to possess weapons such as those involved in the case at Bar.

In an action for declaratory and injunctive relief, concerning the carrying of weapons by special patrolmen of the Department of Social Services of the City of New York, the New York Supreme Court held that the failure of the Legislature to define in Section 1.20 (33) of the Criminal Procedure Law, such patrolmen as Peace officers, meant that they were not Peace Officers within the meaning of the Criminal Procedure Law. Therefore, the Court concluded, they could not carry weapons while on duty. Valez v. Sugarman, 75 Misc.2d 746, 349 N.Y.S.2d 53 (Sup.Ct.1973). The same reasoning applies to campus Security Officers.

POINT III THERE WAS NO ERROR IN THE COURT'S CONDUCT CONCERNING THE REQUESTS TO CHARGE AND INSTRUCTIONS.

Defendants claim that Rule 51 of the Federal Rules of Civil Procedure was not followed in this case. Numerous off-the-record discussions were held during the trial, and numerous opportunities were given all parties to present their respective positions as to the law of the case. Counsel were well aware of the manner in which it would charge in this case prior to the charge itself.

In any event, since the charge was correct, there is no prejudicial error to the Defendants, since this Court can relieve the Defendants from any failure of theirs to object to any instruction, under the authority of Swain v. Boeing Airplane Co., 337 F.2d 940, (2d Cir. 1964) cert.den'd. 380 U.S. 591 (1965), and Hetzel v. Jewel Companies, 457 F.2d 527 (7th Cir.1972).

> "Failure of the Court to take the initiative in setting the stage for receipt of objections to the charge . . . is not reversible error in the absence of prejudice."
> Swift v. Southern Ry.Co., 307 F.2d 307 (4th Cir.1962); see also, Hardigg v. Englett, 250 F.2d 895 (4th Cir.1957); Bradshaw v. Thompson 454 F.2d, 75, (4th Cir.1972) cert.den'd. 409 U.S. 878.

Since the Court's charge was proper, under all the circumstances, the error, if any, is harmless. Rule 61, Federal Rules of Civil Procedure.

POINT IV THE DAMAGES AWARDED ARE FULLY SUPPORTABLE IN THE RECORD

It has been held that the

> "[a]pplication of undue force by law enforcement officers . . . deprives the individual of liberty without due process of law."
> Reid v. Philadelphia Housing Authority 372 F.2d 686, 689 (Ed.Penn. 1974)

Further,

> "An intentional assault by a security guard employed by an agency of the state would establish a valid claim for relief under §1983."
> Reid v. Philadelphia Housing Authority, supra, at 690.

> "Injuries arbitrarily inflicted by the police are constitutionally cognizable and remediable."
> Jenkins v. Avarett, 424 F.2d 1228, 1232 (4th Cir.1970)

> "An action pursuant to §1983 is established when local law enforcement officers, acting under color of state law use excessive force in the enforcement of state and local laws."
> Reilly v. Doyle, 483 F.2d 123, 129 (2nd Cir.1973)

In the case at Bar, there are numerous items of damage which can be summarized as follows:

(1) the improper request of the Defendant Agen that Plaintiff pick up his Registration on campus, especially in light of the knowledge of the Defendant Agen of the incident occurring one week prior and his recollection of the peculiar license plate number, "700-NIK". The jury could have found that the Defendant Agen was abusing his authority to retaliate against the Plaintiff.

(2) The actual physical injuries sustained in the altercation between the parties.

(3) the use of excessive force by utilization of illegal instruments,

(4) the placing of false charges against the Plaintiff,

(5) the incarceration of the Plaintiff until his release in his own recognizance upon arraignment,

(6) the malicious re-filing of charges after their initial dismissal,

(7) the time, trouble, inconvenience and expense of defending such false charges,

(8) punitive damages because of the wanton and malicious nature of the acts of the Defendants.

In assessing the measure of damages, we have not quarrel with the proposition that "[i]n determining whether there has been an invasion of civil rights, lawfullness of the arrest must be measured under state law." Antelope v. George, 211 F.Supp.657, 659 (D.Idaho 1962).

However, Defendants have mis-stated the applicable state law in their Brief.

Defendants state as a legal proposition that "arraignment after a warrantless arrest confirms probable cause for the arrest under New York law." (Brief of Appellants, page 22)

Graham v. Buffalo General Laudries Corp., 261 N.Y. 165 (1933) dealt with a question of pleadings in an action for malicious prosecution. The Plaintiff had pleaded that a magistrate had held him for the Grand Jury, but the Grand Jury had failed to indict. Arraignment alone does not establish prima facie probable cause. Holding by a magistrate after a hearing is the principle to be learned from this case. To the same effect is the case of Langley v. City of New York, 40 A.D.2d 844 (2d Dept. 1972) and the other cases cited by the Appellants. However, such prima facie probable cause can be overcome ". . . by a showing of fraud, perjury or suppression of evidence by the arresting officer." Langley v. City of New York, supra, at p.845. Implicit in the jury's finding in this case, is the proposition that the charges brought by Officer Agen were improper and that he did lack probable cause to make such arrests. Defendants then state the following proposition: "Moreover, damages even for unlawful arrest terminate upon arraignment . . . because arraignment is judicial recognitition of probable cause and thereafter a detention, even though it may be erroneous, is a detention by due process of law." (Brief of Appellants' p. 22).

Plaintiff concedes that that may be the rule. However, it is irrelevant to this case since the Plaintiff

was released in his own recognizance after the first arrest and appeared voluntarily, pursuant to a summons, the second time.

The general proposition, however, of liability for one's actions as stated in a case cited by Defendants is appropriate:

> ". . . a wrongdoer is responsible for the natural and proximate consequences of his conduct and what such consequences may be must be left for a jury to determine." Carpenter v. City of Rochester, 67 Misc.2d 832, 837, 324 N.Y.S.2d 591, 596 (Sup.Ct.1971), aff'd 39 A.D.2d 1015, 335 N.Y.S.2d 255 (4th Dept.1972).

Defendants in their Brief continue to misstate the facts in law, as follows: "an alleged malicious prosecution is not a violation of a Federal civil right unless it results in an arrest." Was not the taking into custody and the chaining to a pole in the Police Station an arrest? Does the fact that the Officer may not have filed the Informations in the Court until the next day detract from this? Does the fact that the Court issued a summons, based upon the re-filed Information, rather than an arrest warrant, heed the Defendants when the very fact of the filing of such an Information is the injury done to the Plaintiff?

As a matter of State law, damages for malicious prosecution without question include amounts spent for attorney's fees in the defense of the case maliciously prosecuted.

> "A plaintiff in a civil rights action should be allowed to recover the attorneys' fees in a State criminal action where the expenditure is a foreseeable result of the acts of the defendant."
> Kerr v. City of Chicago, 424 F.2d 1134, 1141 (7th Cir.1970). See generally, 52 Am.Jur.2d, Malicious Prosecution, Section 98, at p.248 (1970Ed.)

Defendants further contend that because of the little time officer Ceram had to reflect upon the situation, that his conduct must be considered in that perspective. The case of Toomey v. N.Y.City Transit Authority, 6 A.D.2d, 906, 177 N.Y.S.2d 655 (2nd Dept. 1958), cited in support of that proposition, involved a jury question as to whether the deceased Claimant was shot in the course of a robbery, or whether the City Transportation Authority officer had simply struck the man with the revolver, without any probable cause. The Appellate Division set aside a judgment dismissing the claim and ordered a new trial. On the re-trial, the very same Appellate Division upheld a verdict of Eighty-two Thousand dollars, in favor of the decedent. Toomey v. N.Y. City Transit Authority, 10A.D.2d, 728, 199 N.Y.S.2d 281 (2nd Dept. 1960). This case stands

for the simple proposition that in a case of divergent testimony, it is simply a question for the jury to decide. It must be further noted that "[p]articularly in a civil rights case, the amount of damages is a question for the jury's determination." U.S. ex rel. Larkins v. Oswald, 510 F.2d 583, 589, (2nd Cir.1975) citing Basista v. Weir, 340 F.2d at 88 (3rd Cir.1965). The case of Huggins v. State, cited by the Defendants for the same proposition is irrelevant, as it is there conceded that the claimant attacked the officer without warning while armed with a pipe. Huggins v. State, 46 A.D.2d 924, 361 N.Y.S.2d 423 (3rd Dept. 1974).

Upon all the testimony and the reasonable inferences that can be drawn therefrom, it cannot be said that the damages awarded in this case are ". . . so grossly excessive as to shock the judicial conscience." U.S. ex rel. Larkins v. Oswald, supra, at 589, citing Caskey v. Village of Wayland, 375, F.2d 1004, 1007 (2nd Cir. 1967).

As to the question of punitive damages, the jury in this case could have found that Officer Agen's motives were less than pure in requiring the Plaintiff to accompany him to campus, for the purpose of writing a summons which he could have written on the spot. The

motives of both Officers must be seen in light of the violation of State law in possessing the weapons which they had. The Defendant Cerami's motives in slashing away with the black-jack, while, by his own testimony, having been less than secure in that he was being pulled away from the scene by someone, evinces a reckless and wanton disregard for his actions, which can be the basis for punitive damages. It might even be inferred from the facts that a Security Officer was pulling Cerami off, so as to stop him from taking this action, further confirming his recklessness. A showing of bad faith has been held to be sufficient to award punitive damages. Caplin v. Oak, 356 F.Supp.1250 (S.D.N.Y.1973).

Defendants have cited the case of Wilson v. Prasse, 325 F.Supp. 9 (W.D.Penn.1971), aff'd 463 F.2d 109 (3rd Cir.1972) for the proposition that punitive damages require a finding of malice. This is correct as far as it goes. However, Federal Jury Pattern Instructions Section 78.11, goes on to say that punitive damages may be awarded if the injuries were maliciously, wantonly or oppressively done. The Court in this case charged as follows: "An act or failure to act is wantonly done if done in reckless or callous disregard or indifference to the rights of one or more persons, including the injured person."

"An act or failure to act is oppressively done if done in a way or manner which injures or damages or otherwise violates the rights of another person with unnecessary harshness or severity, as by mis-use or abuse of authority or power." (Charge to the Jury, p.21)

Under this charge, which is the correct one, the jury could find for the Plaintiff in a sum for punitive damages. Malice can be inferred from the facts in evidence. Stringer v. Dilger, 313 F.2d 536 (10th Cir. 1963). Stringer parallels the situation in this case and a recitation of its facts is important to understand the principles involved. This was also a civil rights action, based upon a highway Patrolman following a man, who on a prior date had had harsh words with him. The Patrolman stopped the vehicle, took the man out and put him in an armlock, and then struck him with a black-jack. Of course, that case went further as the magistrate before whom the injured party was taken, engaged in a conspiracy with the highway Patrolman to deprive the person of due process of law. A jury verdict, which had been set aside by the Trial Court, was re-instated by the Court of Appeals. See also, generally, Civil Rights Acts - Punitive Damages, 14 A.L.R.Fed. 608 (1973).

CONCLUSION

The Judgment below should be affirmed in all respects.

Respectfully submitted,

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APPENDIX

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in the same proceeding as required by the Administrative Code of the City of New York. Chapter 617 is prospective in effect and the City should complete the acquisition procedure and receive reimbursement by the State in all proceedings where title has vested in the City prior to June 22, 1971, as though chapter 617 had not been enacted.

Dated: December 8, 1971

HON. T. W. PARKER, Commissioner of Transportation

EDUCATION LAW, SECTION 355, subd. 2, par. m—CRIMINAL PROCEDURE LAW (LAWS OF 1970, CHAPTER 996, AS AMENDED) SECTION 140.25.

State University Special Policemen continue to be peace officers subsequent to the effective date of the Criminal Procedure Law (Laws of 1970, Chapter 996) and their geographical jurisdiction is limited to that area specified in § 355 of the Education Law.

This is in reply to your inquiry dated October 7, 1971, concerning the impact of the new Criminal Procedure Law (CPL) as enacted by Laws of 1970, Ch. 996, as amended, effective September 1, 1971, upon Section 355, subd. 2, par. m, of the Education Law.

Section 355, subd. 2, par. m, of the Education Law authorizes the State University Trustees to:

> "m. To appoint from time to time, special policemen for the state university, *who shall be peace officers*, and to remove the same at pleasure, or to provide for their appointment and removal. It shall be the duty of such special policemen to preserve law and order in and about the buildings and grounds of the institution of the state university to which they are assigned, *and their jurisdiction shall extend to the buildings and grounds of such institution and to the extent of one mile beyond such grounds.* Every special policeman appointed under this paragraph shall, when on regular duty, wear conspicuously a metallic shield with the words 'Special Policeman State University of New York' thereon. The compensation, if any, of such special policemen shall be paid by the state university. The appointment of such special policemen shall not be deemed to supersede in any way the authority of peace officers of a jurisdiction within which such buildings or grounds are located. The provisions of this paragraph m. shall not apply to any of the state institutions and property referred to in section five thousand seven hundred nine of this chapter." (Emphasis added.)

You ask whether such appointees may continue to exercise peace officer powers after the effective date of the new Criminal Procedure Law in the absence of their enumeration in the listing of peace officers in § 1.20, subd. 33, of the Criminal Procedure

Law. You also ask whether the geographical jurisdiction of such appointees is determined by the Education Law or by Section 140.25, subd. 5 of the Criminal Procedure Law.

The Temporary Commission on Revision of the Penal Law in its Memorandum in Support and Explanation of Proposed Criminal Procedure Law (1969 McKinney's Sessions Laws of New York, vol. 2, p. 2348) stated that the Criminal Procedure Law "defines both peace officers and police officers in approximately the same manner as does the present code", referring to the now repealed Code of Criminal Procedure. A predecessor Attorney General held that certain officers of the Kings Park State Hospital, appointed pursuant to the Mental Hygiene Law under a section thereof which stated that, "Such attendants and employees, acting as policemen, shall possess all the powers of peace officers on the grounds and premises of such institution and to the extent of one hundred yards beyond such grounds", are in fact peace officers to the extent set forth in said section of the Mental Hygiene Law in spite of the fact that such officers were not enumerated under Section 154 of the Code of Criminal Procedure (1930 Atty. Gen. 467). I am in complete accord with that opinion and conclude that those officers appointed pursuant to Section 355, subd. 2, par. m, of the Education Law will continue to be peace officers to the extent set forth therein subsequent to the effective date of the Criminal Procedure Law and their geographical jurisdiction, which is clearly set forth in said section of the Education Law, is determined by the Education Law.

Dated: October 18, 1971

HON. WALTER J. RELIHAN, JR., Counsel and Vice Chancellor State University

6. REPORT OF THE CHANCELLOR

6.1 Legislative Report No. 1 for 1973

Chancellor Boyer noted that the Trustees had had distributed to them Legislative Report No. 1 which provides a summary of the prefiled bills for the 1973 Legislative Session, which are of significance and interest to the University.

6.2 Approval Action Item Agenda

Chancellor Boyer said that he recommended Board approval of all items on the Action Item Agenda which had been distributed to the Board in advance for its consideration and discussion. He noted that there were at least two such items which Trustees had already questioned him about and he suggested that Mrs. Moore call for discussion of these items in particular.

Amendments to Articles IV, IX and XIII of the Policies of the Board

Mrs. Moore called for discussion upon two proposed resolutions which would amend the Policies of the Board to provide for a basic change in the appointment term of chief administrative officers and to provide for the establishment of a five-year time-frame during which an appointment must be reviewed and reconfirmed or allowed to expire. In addition, the proposed amendments would authorize the Chancellor to grant to a chief administrative officer, upon appointment, a continuing appointment as a member of the University Faculty in his field of academic specialization. Further, the Policies would be amended to provide for periodic study leaves for chief administrative officers.

State University of New York
99 Washington Avenue
Albany, New York 12210

Office of the Chancellor

M E M O R A N D U M

January 24, 1973

TO: The Board of Trustees

FROM: Ernest L. Boyer

SUBJECT: Legislative Report No. 1

The following summary of proposed legislation prepared by University Counsel is submitted for your review.

From among prefiled bills in Senate and Assembly the following have been identified as having a significant impact upon the University. Also included is a subject listing of bills of lesser significance which may nevertheless be of interest.

BILLS OF SIGNIFICANCE

Academic Programs:

1. Senate 523 (Straub) - directs State University Trustees to establish within State University a center for the study of the aging to be concerned with all problems of the aging and to be staffed with professional, technical and other personnel as the Trustees deem necessary.

2. Assembly 219 (Brown) - requires the State University Trustees to establish in State University a research center on gerontology to function in the fields of training, research and publication and community service and offering interdisciplinary training at the graduate and post-graduate levels.

3. Assembly 288 (Landes) - requires the State University Trustees to establish, under their supervision, and in affiliation with a major university, a center for learning disability and an experimental elementary and secondary school to operate in conjunction therewith.

General:

4. Senate 37 (Marchi) - creates a temporary commission of 15 members appointed by the Governor, the temporary President of the Senate and the Speaker of the Assembly to develop, in association with State University and other colleges, means for application of scientific methods and techniques to the learning process.

5. Assembly 421 (Farrell) - directs the State University Trustees to provide fire protection personnel and equipment for every campus under its jurisdiction and authorizes contracts with fire districts or municipalities for such protection.

Governance:

6. Senate 559 (Straub) - requires the Trustees or other governing board of a college to adopt rules and regulations providing for the hearing of student, faculty and staff grievances involving the action or inaction of college officials.

Personnel:

7. Senate 373 (Mason) - amends the Civil Service Law and Education Law to provide that positions in the professional service in State University be certified to the Chancellor by the Civil Service Commission. Currently the Chancellor determines the positions in the professional service and so certifies to the Commission.

Security:

8. Senate 366 (Mason) - extends the definition of "peace officer" included in the Criminal Procedure Law to include security officers, institution safety officers, supervising safety officers, chief safety officers, campus security officers, campus security specialists and building guards. Peace officers as defined in the Criminal Procedure Law are excluded from firearm licensing requirements and are permitted to carry night sticks and mace.

STATE OF NEW YORK

366

1973-1974 Regular Sessions

IN SENATE

(Prefiled)

January 3, 1973

Introduced by Sen. MASON—read twice and ordered printed, and when printed to be committed to the Committee on Codes

AN ACT

To amend the criminal procedure law, in relation to the definition of peace officers

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Subdivision thirty-three of section 1.20 of the criminal procedure law is hereby amended by adding thereto a new subparagraph to be subparagraph (w) to read as follows:

(w) Security Officer, Institution Safety Officer, Supervising Safety Officer, Chief Safety Officer, Campus Security Officer, Campus Security Specialist and Building Guard.

§ 2. This act shall take effect on the first day of September next succeeding the date on which it shall have become a law.

EXPLANATION — Matter in *italics* is new; matter in brackets [ ] is old law to be omitted.

STATE OF NEW YORK

6549

1973-1974 Regular Sessions

IN ASSEMBLY

March 5, 1973

Introduced by Mr. SOLOMON—read once and referred to the Committee on Codes

AN ACT

To amend the criminal procedure law, in relation to the definition of peace officers

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Subdivision thirty-three of section 1.20 of the criminal procedure law is hereby amended by adding thereto a new subparagraph to be subparagraph (w) to read as follows:

(w) Security Officer, Institution Safety Officer, Supervising Safety Officer, Chief Safety Officer, Campus Security Officer, Campus Security Specialist and Building Guard.

§ 2. This act shall take effect on the first day of September next succeeding the date on which it shall have become a law.

EXPLANATION — Matter in *italics* is new; matter in brackets [ ] is old law to be omitted.

STATE OF NEW YORK

S. 2335 A. 2977

1975-1976 Regular Sessions

SENATE—ASSEMBLY

February 5, 1975

IN SENATE—Introduced by Sen. BARCLAY—read twice and ordered printed, and when printed to be committed to the Committee on Codes

IN ASSEMBLY—Introduced by Mr. ZAGAME—read once and referred to the Committee on Codes

AN ACT

to amend the criminal procedure law and the education law, in relation to the definition of police officer and providing for the training of police officers by the state university

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Subdivision thirty-four of section 1.20 of the criminal procedure law is hereby amended by adding thereto a new paragraph, to be paragraph m, to read as follows:

(m) A sworn officer of an authorized campus security department of the state university of New York.

§ 2. Paragraph m of subdivision two of section three hundred fifty-five of the education law, as separately amended by chapters

EXPLANATION — Matter in *italics* is new; matter in brackets [ ] is old law to be omitted.

one hundred seventy-four and three hundred thirteen of the laws of nineteen hundred seventy-four, is hereby amended to read as follows:

m. To appoint from time to time, security officers and peace officers for the state university, and to remove such peace officers at pleasure; provided, however, that any person appointed a peace officer *or security officer* must have satisfactorily completed or complete within six months of the date of his appointment a course of law enforcement training approved by the municipal police training council in consultation with the university *which training shall be made directly or indirectly available by the state university*. It shall be the duty of such security officers and peace officers to preserve law and order in and about the buildings and grounds of the institution of the state university to which they are assigned. Persons appointed peace officers shall, in the course of and actual performance of their official duties, have the powers of police officers as defined in the criminal procedure law and, when so engaged, shall be exempt from prosecution under the penal law for possession of a police nightstick or baton. Persons appointed security officers shall, in the course of and in the actual performance of their official duties have the power to issue and serve a simplified traffic information and appearance ticket in the form prescribed by the commissioner of motor vehicles pursuant to section two hundred seven of the vehicle and traffic law, upon a person when he has reasonable cause to believe that such person has committed a traffic infraction in his presence on the sites owned, operated and maintained by state university, and where applicable, such simplified traffic infractions

shall be administered pursuant to the provisions of article 2-A of the vehicle and traffic law.

The appointment of such security officers and peace officers shall not be deemed to supersede in any way the authority of other peace officers. The provisions of this paragraph m. shall not apply to any of the state institutions and property referred to in section five thousand seven hundred nine of this chapter. 5.709

§ 3. This act shall take effect immediately.

NEW YORK STATE DEFENSE EMERGENCY ACT, MCKINNEY'S UNCONSOLIDATED LAWS, §§ 9123, 9180, 9185; PENAL LAW, § 265.20(a)(1)(a).

The conferring of peace officer status upon Auxiliary Police of the City of Long Beach pursuant to the State Defense Emergency Act does not exempt them from the provisions regarding unlawful possession of weapons contained in the Penal Law.

This is in response to your letter of March 6, 1972 in which you request my opinion as to whether members of the City of Long Beach Auxiliary Police who are not licensed to possess a firearm may carry pistols while on duty or while participating in drills or exercises. You state that a Nassau County Office of Civil Defense regulation prohibits the Auxiliary Police from carrying firearms at such times but that the City of Long Beach has granted peace officer status to its Auxiliary Policemen. You ask if the City's action allows the arming of the Auxiliary Police.

The New York State Defense Emergency Act provides that each county outside New York City and each city shall, in furtherance of its plan for the civil defense:

> "22. Recruit, equip and train auxiliary police or special deputy sheriffs in sufficient number to maintain order and control traffic in the event of an attack and to perform such other police and emergency civil defense functions as may be required during and subsequent to attack." [McKinney's Unconsolidated Laws, § 9123(22)].

Article 8 of the Act further provides, in part:

> "The local legislative body of any county, town, city or village may by resolution confer or authorize the conferring upon members of the auxiliary police the powers of peace officers, subject to such restrictions as such body shall impose." [McKinney's Unconsolidated Laws, Section 9185].

The phrase "peace officer" as used in Article 8 refers to an officer mentioned in section 1.20(33) of the Criminal Procedure Law "and such other officers duly authorized pursuant to this act to act as peace officers during attack or drill" (McKinney's Unconsolidated Laws, Section 9180[3]).

However, auxiliary policemen, although given the "powers of peace officers" by the City of Long Beach, do not thereby come within the exemption from the penal provisions regarding unlawful weapons possession [Penal Law, § 265.20(a).

(1) (a)]. That section, insofar as it refers to peace officers, is specifically limited to "peace officers as defined in subdivision thirty-three of section 1.20 of the criminal procedure law. . . ." Subdivision 33 of section 1.20 does not include auxiliary police among those it defines as peace officers.

In light of the foregoing, it is my opinion that the conferring of peace officer status upon Auxiliary Police of the City of Long Beach pursuant to the State Defense Emergency Act does not exempt them from the provisions regarding unlawful possession of weapons contained in the Penal Law.

Dated: July 14, 1972

MR. JAMES I. NAGOURNEY
City Manager

NEW YORK STATE CONSTITUTION, ARTICLE IX, SECTION 2(c), SECTION 3(d); MUNICIPAL HOME RULE LAW, SECTIONS 2 AND 10; SOIL AND WATER CONSERVATION DISTRICTS LAW, SECTION 6.

A county legislature may not enlarge the membership of the board of directors of a soil and water conservation district established within the county.

This is in response to your letter of July 10, 1972, in which you ask my opinion whether a county legislature may by local law enlarge the membership of the board of directors of the soil and water district of that county. I assume the district in question has been properly created by resolution of the legislative body of the county pursuant to Soil and Water Conservation Districts Law, Section 5(1), or is continued pursuant to Section 5(2) thereof.

Section 6 of the Soil and Water Conservation Districts Law provides, in pertinent part:

"§ *6. Designation of district directors*

"When a county has been declared a soil and water conservation district a board of directors *consisting of five members* shall be appointed by the county board.* * *" (Emphasis added.)

Section 10(1) (b) (8) of the Municipal Home Rule Law, implementing Article IX, Section 2 of the State Constitution, allows a county to adopt and amend local laws not inconsistent with the Constitution *or with any general law* relating to the control of floods or the conservation of soil.

approve such appointment or contract of employment or the payments made thereunder.

Dated: November 30, 1972

HAROLD C. VROOMAN
City Attorney

CRIMINAL PROCEDURE LAW, § 1.20(33)(34).

Civil Defense Auxiliary Police of the City of Lackawanna are not peace officers as defined in Criminal Procedure Law, § 1.20(33)(34).

NEW YORK STATE CIVIL DEFENSE EMERGENCY ACT, McKinney's Unconsolidated Laws, §§ 9123, 9180, 9185.

Civil Defense Auxiliary Police of the City of Lackawanna may be granted peace officer powers in which event they may exercise such power only during an attack or duly authorized drill.

This is in reply to your letter of October 25, 1972 requesting an opinion as to:

1. Whether or not members of the Civil Defense Auxiliary Police of the City of Lackawanna are peace officers as defined in Criminal Procedure Law, § 1.20(33)(34); and
2. Whether or not Civil Defense Auxiliary Police of the City of Lackawanna have police powers as peace officers, as special police, or patrolmen 24 hours a day.

In your letter you state that Division 4, § 2-329.4, of the Lackawanna Code of Ordinances provides that, "Persons so appointed [Civil Defense Auxiliary Police] shall possess all the powers of the regular police patrolman at the places for which they are respectfully appointed."

Criminal Procedure Law, § 1.20(33) includes an extensive list of persons who are peace officers and Section 1.20(34) an extensive list of those who are police officers. Civil Defense Auxiliary Policemen are not listed in either of these subdivisions.

By reason of the fact that they are not so listed, it must be presumed that the Legislature intentionally omitted to include them therein. "* * * the specific mention of one person or thing implies the exclusion of other persons or thing." McKinney's Cons. Laws of N.Y., Book 1, Statutes, § 240. Civil Defense Auxiliary Policemen cannot therefore, be considered

either peace officers or police officers within the definition of Criminal Procedure Law, § 1.20(33)(34).

Civil Defense Auxiliary Police are appointed pursuant to the authority of the New York State Defense Emergency Act which provides that each county outside of New York City and each city in the furtherance for its plan for Civil Defense shall:

> "22. Recruit, equip and train auxiliary police or special deputy sheriffs in sufficient number to maintain order and control traffic in the event of an attack and to perform such other police and emergency civil defense functions as may be required during and subsequent to attack." (McKinney's Unconsolidated Laws, § 9123[22].)

Article 8 of the Act provides, in part:

> "The local legislative body of any county, town, city or village may by resolution confer or authorize the conferring upon members of the auxiliary police the powers of peace officers, subject to such restrictions as such body shall impose." (McKinney's Unconsolidated Laws, § 9185.)

Thus, under the authority of this latter section, the local legislative body is authorized to confer peace officer power upon Civil Defense Auxiliary Policemen. For the purposes of the Act the phrase, "peace officer" refers to an officer mentioned in Section 1.20(33) of the Criminal Procedure Law and "such other officers duly authorized pursuant to this article to act as officers during attack or drill". (McKinney's Unconsolidated Laws, § 9180[3].) Since Civil Defense Auxiliary Police authority flows from Article 8 of the Unconsolidated Laws and their purpose is to maintain order in event of an attack or emergency under Section 9123(22), it is clear that Civil Defense Auxiliary Policemen are authorized to act as peace officers only during an attack or drill and do not, therefore, have peace officer power 24 hours a day, unless so employed.

The case of *Murray* v. *Tofany*, 33 A D 2d 1080, cited in your letter does not change this result. That case was decided under the former Code of Criminal Procedure and not under the Criminal Procedure Law and the appointment of special village policemen is authorized pursuant to the Village Law,

rather than the New York State Defense Emergency Act.

You should further note that Division 4, § 2-329.4, of the Lackawanna Code of Auxiliaries which purports to grant Auxiliary Policemen the power of regular police patrolmen is unauthorized since the City of Lackawanna is empowered only to grant peace officer powers under Section 9185. (Informal opinions of the Attorney General dated January 19, 1972 and July 14, 1972 [copies enclosed].)

I conclude, therefore, that Civil Defense Auxiliary Policemen of the City of Lackawanna are not peace officers as defined in the Code of Criminal Procedures, § 1.20(33) (34), but when duly authorized to act as peace officers by the City of Lackawanna, may exercise such authority only during an attack or drill.

Dated: December 11, 1972

NICHOLAS HARAGOS
City Attorney

TOWN LAW, ARTICLE, 13, § 213; ELECTION LAW, § 150.

A person must be a registered voter of the town under permanent personal registration, registered from the address from which he wishes to vote, in order to be entitled to vote in an election for improvement district commissioner under Article 13 of the Town Law.

I acknowledge receipt of your letter of November 28, 1972, in which as attorney for the Great Neck Park District you inquire as to the qualifications of voters at an election to be held on December 12, 1972, under Town Law, Article 13, for park district commissioner. You inquire whether a voter at such an election must be a registered voter under permanent personal registration.

Town Law, § 213 sets forth the qualifications of a voter at improvement district elections. One of those requirements is that for a person to vote, he or she must be:

> "* * * an elector of the town who shall have resided in the improvement district for a period of 30 days next preceding any election of commissioners* * *".

There is no statutory provision for special registration for improvement district elections. Election Law, § 150 provides in part, as follows:

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

CLIFFORD J. ARNOLD,

Plaintiff-Appellee,

-vs-

Docket No.
75-7243

DONALD M. AGEN and VICTOR CERAMI,

Defendants-Appellants.

CERTIFICATE OF SERVICE

STATE OF NEW YORK)
COUNTY OF ERIE) ss:

The Undersigned Attorney certifies that on the 24th day of July, 1975, he served two copies of the within Brief and Appendix upon J. DANIEL LENAHAN, ESQ., and HON. LOUIS J. LEFKOWITZ, ESQ., (Peter J. Dooley, Esq., of Counsel), Attorneys for the Defendants-Appellants, at 2056 Seneca Street, Buffalo, New York 14210, and The Capitol, Albany, New York 12224, the respective addresses designated by said attorneys for that purpose, by depositing true copies thereof enclosed in a post-paid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States Postal Service within the State of New York located at the Liberty Bank Building in the City of Buffalo, New York. The undersigned affirms that the foregoing statement is true, under the penalties of perjury.

Dated: July 24, 1975

David Gerald Jay

DAVID GERALD JAY